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IN THE

Supreme Court of the United States

OCTOBER TERM, 1973

No. 73-72

PEERLESS PRESSED METAL CORPORATION,
Petitioner,

v.

INTERNATIONAL UNION OF ELECTRICAL, RADIO & MACHINE WORKERS, AFL-CIO, IN BEHALF OF ITSELF AND ITS LOCAL 209,
Respondents.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT

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No. ———

PEERLESS PRESSED METAL CORPORATION,
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v.

INTERNATIONAL UNION OF ELECTRICAL, RADIO & MACHINE WORKERS, AFL-CIO, IN BEHALF OF ITSELF AND ITS LOCAL 209,
Respondents.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT

Petitioner, Peerless Pressed Metal Corporation, prays that a Writ of Certiorari issue to review the final Judgment of the United States Court of Appeals for the First Circuit entered on April 9, 1973

I. OPINIONS BELOW

The Court of Appeals decision is not yet officially reported, but may be found at 82 LRRM 3089. The District Court decision is unreported. Copies of these decisions as well as a copy of the Arbitrator's award and "clarification statement" appear herein as Appendices A, B, and C, respectively.

II. JURISDICTION

The Judgment of the Court of Appeals was entered on April 9, 1973. The jurisdiction of this Court is invoked under 28 U.S.C. Section 1254 (1) (1964).

III. QUESTIONS PRESENTED

1. What is the appropriate standard to be applied by the Federal Courts in reviewing labor arbitration awards?
2. Does a judicial determination that a matter is arbitrable preclude a subsequent judicial determination that the arbitrator has exceeded his authority?
3. In the absence of a specific statutory provision for assessment of attorney's fees, may a party who prevails in District Court be charged with the losing party's attorney's fees when the District Court decision is reversed?

IV. STATUTES INVOLVED

The relevant provisions of the Labor Management Relations Act, 1947, as amended, 29 U.S.C. 151 et seq. and of the United States Arbitration Act, 1925, as amended, 9 U.S.C. 1 et seq. are set forth in Appendix D.

V. STATEMENT OF THE CASE

The Petitioner is a privately owned company (hereinafter referred to as the "Company") located in Watertown, Massachusetts engaged in the manufacture of quality precision metal products. The production and maintenance employees are represented by the International Union Electrical Workers, Local 209, AFL-CIO (hereinafter called the "Union").

On October 30, 1965, William F. Burke, a member of the bargaining unit, was promoted to the position of foreman of the Spot Welding and Assembly Department. Because of a decline in the need for supervision due to business conditions, Burke was laid off on September 11, 1970. At the time of his layoff, Burke asked that he be re-employed in the bargaining unit based upon the seniority he had acquired prior to his promotion to foreman. The Company declined to do so. Notwithstanding there was no provision for such return in the existing collective bargaining agreement, the Union attempted to raise the matter by filing a grievance on Burke's behalf.

The grievance was not resolved by the parties, and the Union then attempted to invoke the arbitration provisions of the collective bargaining agreement. The Company, claiming the dispute was not arbitrable, sought to resist the arbitration in the United States District Court for the District of Massachusetts. The District Court ordered arbitration, *Peerless Pressed Metal Corp.* v. *International Union of Electrical, Radio & Machine Workers*, in an unreported decision. The Company appealed and the First Circuit affirmed, *Peerless Pressed Metal Corp.* v. *IUE*, 451 F.2d 19, 78 LRRM 2828 (1971), applying the "all doubts" rule of *Steelworkers* v. *Gulf & Warrior Navigation Co.*, 363 U.S. 574, 46 LRRM 2416 (1960) holding *inter alia:*

> "A dispute may not be kept from the arbitrator on this ground so long as it is "possible", even if as a court we might not think it "reasonable", for an arbitrator to decide in favor of the party demanding arbitration without thereby, in effect, amending the plain language of the agreement." Supra at 451 F.2d 20, 78 LRRM 2828.

Thereafter the matter was submitted to arbitration and on December 10, 1971, the Arbitrator issued his

opinion and award.[1] Expressly conceding "the contract was silent" as to any provision covering this dispute, he drew upon alien sources outside the contract by relying upon a line of reported arbitral precedents, that has always "assumed" employees promoted to supervision retained vested rights to return to a bargaining unit and that therefore Burke was entitled to reinstatement.

On December 23, 1971, the Union requested that the Arbitrator clarify his award in that it made no reference to the matter of compensation for Burke. The Company objected to the Union's request, but the Arbitrator nevertheless issued a "clarification statement" on January 20, 1973, stating that Burke was entitled to compensation from the date of the Company's refusal to reinstate him into the bargaining unit.

The Union thereupon filed a complaint in United States District Court for the District of Massachusetts seeking in essence to confirm the award and clarification statement. The Company responded with a counterclaim seeking to vacate the award and clarification statement.

On cross motions for summary judgment, the District Court, after a thorough analysis, found that ". . . the Arbitrator exceeded his authority in making the award in that it failed "to draw its essence from the collective bargaining agreement."[2] *I.U.E.* v. *Peerless Pressed Metal Corp.* (unreported). The Court also held that in view of its vacation of the award itself, it was unnecessary

[1] The award includes rulings on a number of issues both procedural and substantive, other than the merits, which are not raised in this petition for certiorari. The petitioner's basic thrust herein is that the arbitrator's award is invalid because it exceeded the scope of his authority and should not have been upheld by the Circuit Court below.

[2] Article XVII of the labor contract expressly denied the arbitrator authority to "add to, detract from, or in any way alter the provisions of this agreement." (See Appendix C p. A-18 of this petition.)

to reach the question of the validity of the "clarification statement".[3]

On appeal to the Court of Appeals for the First Circuit, the District Court decision was reversed with an additional award of attorney's fees to the Union. *I.U.E.* v. *Peerless Pressed Metal Corp.*, —— F.2d ——, 82 LRRM 3089 (April 9, 1973). In a short *per curiam* decision, the Court of Appeals relied almost exclusively on its previous holding that the dispute was arbitrable and therefore, *a fortori*, the Arbitrator could not possibly have exceeded his authority. Under this rationale, the Court thus, in effect, precluded a subsequent judicial determination that the Arbitrator had exceeded his authority as required under *Steelworkers* v. *Enterprise Car & Wheel Corp.*, 363 U.S. 593, 46 LRRM 2423 (1960).

Even though the Company had prevailed in the District Court, the Court of Appeals awarded the Union attorney's fees for the District Court proceeding based upon "the intransigence of (the Company) in resisting enforcement of the arbitration award . . ." For the reasons set forth hereinafter the Company seeks review of the Court of Appeals action.

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[3] The complete text of the District Court's opinion appears in Appendix B to this petition.

REASONS FOR GRANTING THE WRIT

1. IN THE THIRTEEN YEARS SINCE THIS COURT FIRST ATTEMPTED TO DELINEATE THE APPROPRIATE STANDARD FOR REVIEW OF ARBITRATION AWARDS IN *STEELWORKERS* v. *ENTERPRISE WHEEL & CAR CORP.*, 363 U.S. 593, 46 LRRM 2493 (1960), CONSIDERABLE CONFUSION AND CONFLICT HAS DEVELOPED AMONG THE CIRCUITS.

In the landmark decision *Textile Workers* v. *Lincoln Mills*, 353 U.S. 448, 40 LRRM 2113 (1957), this Court held that Sec. 301(a) of the Labor Management Relaitons Act [4] authorized the federal judiciary to fashion a uniform body of substantive law to be applied in suits dealing with collective bargaining agreements.

Some three years later in the now so-called "Steelworkers Trilogy" [5] the Court sought to flesh out a portion of the substantive law by attempting a basic delineation of arbitral authority.

Of the three cases encompassing the "trilogy", it is *Enterprise* which dealt specifically with judicial review of arbitration awards; and it is *Enterprise* which has engendered the most comment, criticism and confusion. Speaking for the Court in *Enterprise*, Mr. Justice Douglas first stated:

> "The refusal of courts to review the merits of an arbitration award is the proper approach to arbitration under collective bargaining agreements. The federal policy of settling labor disputes by arbitra-

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[4] 29 U.S.C. § 185(a).

[5] *Steelworkers* v. *American Mfg. Co.*, 363 U.S. 564, 46 LRRM 2414 (1960); *Steelworkers* v. *Warrior & Gulf Navigation Co.*, 363 U.S. 574, 46 LRRM 2416 (1960); *Steelworkers* v. *Enterprise Wheel & Car Corp.*, 363 U.S. 593, 46 LRRM 2423 (1960).

> tion would be undermined if courts had the final say on the merits of the awards."

He went on to say, however;

> "Nevertheless, an arbitrator is confined to interpretation and application of the collective bargaining agreement; he does not sit to dispense his own brand of industrial justice. He may, of course, look for guidance from many sources, yet his award is legitimate only so long as it draws its essence from the collective bargaining agreement. When the arbitrator's words manifest an infidelity to this obligation, courts have no choice but to refuse enforcement of the award." 363 U.S. at 597, 46 LRRM 2425.

Thus, under *Enterprise*, courts are not to review the merits of arbitration awards, but are to refuse to enforce such awards if the arbitrator exceeds the authority given to him under the contract.

In the thirteen years since *Enterprise*, attempts to apply the above teachings have resulted in a myriad of opinions with the Circuit Courts variously applying the following standards:

> —an award should not be vacated so long as the interpretation was not arbitrary. *Local 7-644 Oil, Chemical & Atomic Workers* v. *Mobil Oil Co.*, 350 F. 2d 708, 59 LRRM 2938 (CA 7 1965)

> —an award should be vacated when it is contrary to the terms of the collective bargaining contract. *Amanda Bent Bolt Co.* v. *U.A.W.*, 451 F. 2d 1277, 79 LRRM 2023 (CA 6 1971)

> —an award should be vacated when there is no ground upon which to base his interpretations. *H. K. Porter Co.* v. *United Saw, File and Steel Products Workers*, 333 F. 2d 596, 56 LRRM 2534 (CA 3 1964)

> —an award should not be vacated unless the reasoning is so palpably faulty that no judge, or group of judges, could ever conceivably have made such a ruling. *Safeway Stores* v. *Bakery Workers, Local 111*, 390 F. 2d 79, 67 LRRM 2646 (CA 5 1968)

The variety of approaches to the *Enterprise* test can be clearly illustrated by a comparison of the Second Circuit's decision in *Torrington Co.* v. *Metal Products Workers*, 362 F. 2d 677, 62 LRRM 2495 (1966) with the Ninth Circuit's decision in *Holly Sugar Corp.* v. *Distillery Workers*, 412 F. 2d 899, 71 LRRM 2841 (1969).

In *Torrington*, the Union had sought unsuccessfully in negotiations to have a paid voting time provision included in the contract. In *Holly*, the Union had sought unsuccessfully in negotiations to have a general painter classification included in the contract. In both cases, the arbitrators found the companies obligated to do that which they had successfully resisted including in the contract. Yet, in *Torrington*, the award was vacated and in *Holly* the award was enforced.

The confusion existant under *Enterprise* is perhaps best summarized by the Third Circuit which has figuratively thrown up its hands in frustration at the task of attempting to harmonize the various decisions in this area.

> ". . . one problem has emanated from the cases which have followed *Enterprise*: that of formulating a consistent and workable standard to be utilized by the courts in exercising the function of review. Circuit and District Courts have not exuded uniformity . . . *Each case seems to have fashioned its own standard* . . ." *Honold Mfg. Co.* v. *Fletcher*, 405 F. 2d 1123, 1126; 70 LRRM 2368, 2369 (1969) (Emphasis supplied)

It is thus clear that the inherent conflict in *Enterprise* has spawned a situation of confusion which has frustrated

the original objective of *Lincoln Mills*; to fashion a consistent body of federal substantive labor law.[6]

Petitioner submits that the time is ripe for this Court to review and clarify *Enterprise*.

2. THE RATIONALE USED BY THE COURT OF APPEALS BELOW IS CONTRARY TO THE TEACHINGS OF THIS COURT IN THE "STEELWORKER TRILOGY" AND CONFLICTS WITH THE APPROACH OF OTHER CIRCUITS.

Despite the considerable confusion engendered by *Enterprise*, one point has emerged with relative clarity; the standards for post award judicial review (vague though they may be) are different from the standards for the preliminary determination of arbitrability.

It is clear that the preliminary question of arbitrability is a separate and distinct issue from the subsequent question of review of an arbitrator's award.

In *Warrior & Gulf*, the Court dealt with the first issue and indicated in no uncertain terms that the judicial role was severely circumscribed. The Court made plain that all doubts were to be resolved in favor of arbitration:

> "An order to arbitrate the particular grievance should not be denied unless it may be said with positive assurance that the arbitration clause is not susceptible to an interpretation that covers the asserted dispute. Doubts should be resolved in favor of coverage." *Supra* at 363 U.S. 582-3, 46 LRRM 2419-20.

In *Enterprise*, however, the Court considered post award judicial review, and, despite the extravagant rhetoric, recognized the possibility of arbitral excesses:

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[6] Another significant illustration of the confusion on this subject is the unresolved conflict over the applicability of the U. S. Arbitration Act, 9 U.S.C. § 1 et seq. Compare, for example, *Honold* with *Amanda Bent Bolt*.

> "When the arbitrator's words manifest an infidelity to this obligation, courts have no choice but to refuse enforcement of the award." Supra.

In the thirteen years since the trilogy, several circuit courts have stated explicitly that arbitrability and post award review are two separate issues and a holding of arbitrability does not insulate the subsequent award from judicial review. On this point, the Fifth Circuit has stated:

> ". . . there may be in these controversies two distinct problems. One is whether the grievance is arbitrable. The other is whether the award of the arbiter is to be enforced. *To order arbitration is not to approve in advance all, or for that matter, any thing that the arbiter does.* Especially where unusual difficulties are indicated courts expressly defer problems of enforcement to post award proceedings." (Emphasis supplied) *Safeway Stores* v. *Bakery Workers, Local 111*, 390 F. 2d 79, 81; 67 LRRM 2646, 2647 (1968).

The Ninth Circuit in *Holly Sugar Corp.*, supra, has interpreted this Court's teachings in exactly the same way:

> "Moreover, Holly is quite correct in its argument that simply because a court would compel arbitration in a particular dispute does not necessarily mean that it would approve of everything or anything which the arbitrator might decide in resolving the dispute." Supra, 412 F. 2d 902, 71 LRRM 2843.

The Second Circuit is not only in accord with the foregoing but has succintly stated the rationale, that "No great harm is done by applying a liberal rule as to arbitrability, if the court carefully scrutinizes what the arbitrator later decides." [7] *Torrington Co.* v. *Metal Products Wrokers*, supra 362 F. 2d 680 fn.4, 62 LRRM 2497 (1966).

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[7] Citing Hays, *Labor Arbitration, A Dissenting View*, p. 80 (1966).

In the present case, however, the Circuit Court utilized a "bootstrap" argument which has been rejected by other circuits. The Court in a brief *per curiam* decision reversed District Judge Murray's carefully reasoned opinion on the basis that having held the dispute arbitrable, an award in favor of the union was insulated from judicial review.

> "In *Peerless Pressed Metal Corp.* v. *I.U.E.*, 1 Cir., 1971, we must necessarily have ruled, by requiring arbitration of the issue between the parties, that a decision in favor of the union would not violate the collective bargaining contract on its face. The district court's refusal to enforce the award in its favor, from which refusal the union now appeals, was based on a contrary view of the proper construction of the contract. In the light of *Peerless*, this was no longer a permissable conclusion." [8] *I.U.E.* v. *Peerless Pressed Metal Corp.* (Appendix A herein)

The Court has thus, in one fell swoop, rendered *Enterprise* meaningless and made arbitrability and post award review synonymous. Such a conclusion is clearly in conflict both with this Court and with other circuits.

3. THE AWARD OF ATTORNEY'S FEES BY THE COURT OF APPEALS IS IN DIRECT CONFLICT WITH THIS COURT'S RECENT DECISION IN *HALL* v. *COLE*, —— U.S. —— (NO. 72-630), 83 LRRM 2177 (MAY 21, 1973).

This Court has, on several occasions dealt with the question of attorney's fees as recoverable costs. In *Fleischmann Distilling Corp.* v. *Maier Brewing Co.*, 386 U.S. 714 (1967), the Court stated the general rule that counsel fees are ordinarily not recoverable:

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[8] Interestingly enough, a reading of the Court's opinion holding the dispute arbitrable shows that they did so with considerable reluctance, and in fact characterized the union's position as "weak". Supra 451 F.2d 21.

> "The rule here has long been that attorney's fees are not ordinarily recoverable in the absence of a statute or enforceable contract providing therefor." 386 U.S. 717.

In *Hall* v. *Cole*, Mr. Justice Brennan, speaking for the Court, exhaustively reviewed the entire subject of attorney's fees as recoverable costs. While reaffirming the traditional American rule disfavoring the allowance of attorney's fees, the Court noted two exceptions within the inherent equitable powers of the federal courts.

Thus, Mr. Justice Brennan indicated that a federal court may award counsel fees; (1) when the unsuccessful litigant has acted "in bad faith, vexatiously, wantonly, or for oppressive reasons", or (2) where the plaintiff's successful litigation "confers a substantial benefit on the members of an ascertainable class, and where the court's jurisdiction over the subject matter of the suit makes possible an award that will operate to spread the costs proportionately among them." Supra —— U.S. ——, 83 LRRM 2178-9.

Clearly, the Circuit Court's award of attorney's fees must be evaluated solely in accordance with the first exception, which this Court has characterized as "punitive".[9] Speaking of this punitive basis for fee shifting, this Court stated in *Hall* v. *Cole*:

> ". . . the essential element in triggering the award of fees is therefore the existence of 'bad faith' on the part of the unsuccessful litigant." 83 LRRM 2178-9.

Yet, here there has been no finding of "bad faith" on the part of the Company and no evidence to support such a finding. In fact, in the District Court proceeding, for

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[9] There is obviously nothing in this case which would bring into play the "common benefit" theory, and this was not the basis of the court's award.

which the union was awarded counsel fees, the Company was the *successful* litigant.

The Court of Appeals based the award on the Company's "intransigence" in resisting the arbitrator's award in light of its own earlier decision holding the dispute arbitrable. As has been previously shown, however, the weight of authority holds that these are two separate issues, and the Company can hardly be charged with knowledge, before the fact, that the Court of Appeals was going to adopt its own particular type of bootstrap reasoning.

There is no question that the award of attorney's fees in this case is punitive and contrary to the holdings of this Court. The question is whether it is equitable and justified. Based upon this Court's decision in *Hall* v. *Cole*, the answer clearly is in the negative.

CONCLUSION

For the foregoing reasons, it is urged that this petition for a writ of certiorari be granted.

Respectfully submitted,

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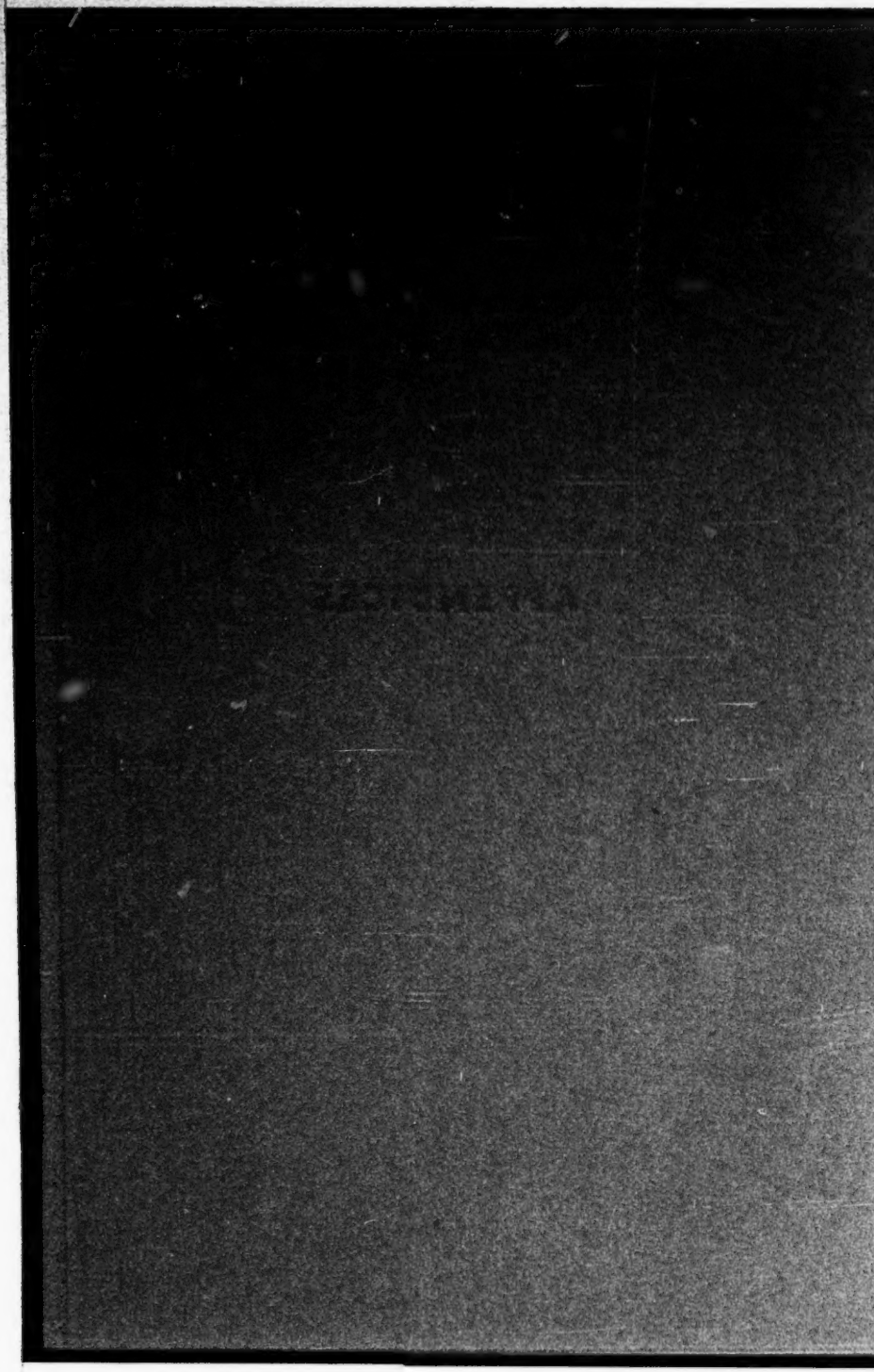
July 6, 1973



APPENDIX A

UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT

No. 72-1377

INTERNATIONAL UNION OF ELECTRICAL, RADIO AND MACHINE WORKERS, AFL-CIO, ETC.,
Plaintiff, Appellant,

v.

PEERLESS PRESSED METAL CORPORATION,
Defendant, Appellee.

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF MASSACHUSETTS

Before COFFIN, *Chief Judge,*
ALDRICH and MCENTEE, *Circuit Judges*

Michael A. Feinberg, with whom *Flamm, Mason & Pavern* was on brief, for appellant.
Julius Kirle for appellee.

April 9, 1973

PER CURIAM. In *Peerless Pressed Metal Corp.* v. *IUE*, 1 Cir., 1971, 451 F.2d 19, we must necessarily have ruled, by requiring arbitration of the issue between the parties, that a decision in favor of the union would not violate the collective bargaining contract on its face. The district court's refusal to enforce the award in its favor, from which refusal the union now appeals, was based on

a contrary view of the proper construction of the contract. In the light of *Peerless*, this was no longer a permissible conclusion. The only question before the district court was whether the arbitrator's choice was, by reason of some circumstance outside the contract itself, "so palpably faulty that no judge, or group of judges, could ever conceivably have made such a ruling." *Safeway Stores* v. *Bakery Workers Local 111*, 5 Cir., 1968, 390 F.2d 79, 82. The arbitrator's careful decision could not be so viewed.

No more supportable is appellee's claim that the arbitrator, in clarifying his award of reinstatement by explicitly stating that the grievant should be made whole for any loss of pay, exceeded his authority under the submission agreement. The fact that the agreement was silent as to remedy cannot under these circumstances be of assistance to appellee. *Newark Wire Cloth Co.* v. *Steelworkers*, D.N.J., 1972, 339 F. Supp. 1207.

We consider the intransigence of appellee in resisting enforcement of the arbitration award, made after our opinion in *Peerless*, as justifying an award of attorney's fees. The award of such fees will be confined to services in connection with proceedings in the district court. We do not say, as a matter of law, that a party's ability to persuade a district court to rule in his favor necessarily insulates him against a fee award. In this case, however, we recognize that our statement in *Peerless* that the arbitrator "may look to the 'law of the shop' and to the negotiations which led to the present agreement," 451 F.2d at 21, may have misled the court into giving an overrestrictive interpretation of our opinion. Since appellee prevailed below under these circumstances we do not think it fair to award counsel fees against it on this appeal.

The judgment is reversed; appellant is directed to submit a detailed statement of services rendered in connection with the district court proceedings.

APPENDIX B

UNITED STATES DISTRICT COURT
DISTRICT OF MASSACHUSETTS

Civil Action No. 72-435-M

INTERNATIONAL UNION OF ELECTRICAL, RADIO & MACHINE WORKERS, AFL-CIO, IN BEHALF OF ITSELF AND ITS LOCAL 209,

Plaintiff,

v.

PEERLESS PRESSED METAL CORPORATION,

Defendant.

MEMORANDUM

MURRAY, D.J. Plaintiff, the International Union of Electrical, Radio and Machine Workers, AFL-CIO, and its Local 209 (all hereinafter called the Union), brings this action to enforce the terms of the collective bargaining agreement concerning the arbitration award made in favor of the Union. The defendant, by its counterclaim, seeks to have the award vacated on the ground it exceeds the authority of the Arbitrator. The Union and the defendant each filed motions for summary judgment. As between the parties, there is no genuine issue as to a material fact.

The undisputed facts may be stated as follows. William F. Burke was hired by the defendant on August 18, 1952, and was promoted out of the bargaining unit to foreman on or about October 30, 1965. He was laid off by the defendant on September 11, 1970. He then requested defendant to return him to the bargaining unit on the basis of seniority gained while a member of the bargaining unit. The defendant refused. The Union filed a griev-

ance on behalf of Burke, alleging that the defendant's refusal constituted a violation of the collective bargaining agreement entered into between the parties on March 24, 1970 and which expires on March 23, 1973. A copy of this agreement is annexed to the complaint and marked Exhibit A.

When the Union and defendant could not reach an agreement, the Union sought arbitration procedure. The defendant thereupon brought an action in this court (Civil No. 71-525-G) to enjoin the arbitration claiming the dispute was not arbitrable. This court denied relief, and on appeal to the Court of Appeals the district court's order to arbitrate was affirmed. *Peerless Pr. Met. Corp.* v. *International U. of E., R. & M. W.*, 451 F.2d 19 (1971).

The issue presented to arbitration concerned the propriety of defendant's refusal to grant Burke's demand made when he was laid off on September 11, 1970 that he be returned to the bargaining unit on the basis of the seniority rights which he asserted. On December 10, 1971 the Arbitrator made his award as follows:

1. Neither reasons of procedural or substantive arbitrability bar consideration of the grievance on its merits. The issue is found to be arbitrable.

2. On October 30, 1965, when Walter [sic] Burke was promoted out of the bargaining unit to the position of foreman he had a vested right to the seniority in the bargaining unit which he had accrued since the date of his hire in 1957 [sic]. Upon the date of the loss of his foreman's job on September 11, 1970, Burke became entitled to reinstatement in the bargaining unit with such seniority as he had accrued up to the date of his promotion on October 30, 1965.

The Arbitrator's written opinion on the award was submitted by him with the award. On December 23, 1971

the Union requested the Arbitrator to clarify the award in that it made no express reference to the matter of compensation for Burke from the date of defendant's refusal to reinstate him. The defendant objected to the Union's request. On January 20, 1972 the Arbitrator submitted a statement purporting to make explicit "that which he considered implicit in the wording of the award . . . ."

Defendant has refused to comply with the award and seeks to vacate it on the ground that it did not draw its essence from the bargaining agreement, and that the clarification statement was in excess of the authority vested in the Arbitrator.

The issue submitted to the Arbitrator involved the underlying claim that William Burke as a laid-off foreman had the right to compel the defendant to return him to the bargaining unit. On this point the Arbitrator's decision was that Burke became entitled to reinstatement in the bargaining unit, and in the clarification statement, so called, purported to leave no doubt as to his decision by saying: "Clearly implied in the award is the requirement that since Burke became entitled to reinstatement in the bargaining unit on September 11, 1970, the Company must reinstate him effective as of that date." Arbitrator's Statement at 3 (January 20, 1972).

Review of the Arbitrator's decision by this court is subject to the standards of judicial restraint made applicable to the field of industrial relations between employers and employees. *Steelworkers* v. *American Mfg. Co.*, 363 U.S. 564 (1960); *Steelworkers* v. *Warrior & Gulf Co.*, 363 U.S. 574 (1960); *Steelworkers* v. *Enterprise Corp.*, 363 U.S. 593 (1960). Ordinarily, a court asked to enforce an arbitrator's decision should refrain from becoming involved in the interpretation of the substantive provisions of the bargaining agreement. *Steelworkers* v.

Enterprise Corp., supra at 597. However, an arbitration agreement is a matter of contract binding on the arbitrator, and his determination that he has stayed within the areas which the parties marked out for his consideration by the bargaining agreement "will not be insulated from subsequent judicial review". *Camden Industries Co.* v. *Carpenter's Local Union No. 1688*, 353 F.2d 178 (1st Cir. 1965). *See Steelworkers* v. *Enterprise Corp., supra* at 597.

The defendant having challenged the award has the burden of showing that the Arbitrator exceeded his authority, for the award is presumed valid. The court, of course, may examine the reasons given by the Arbitrator to support his decision, even though he was not required to give them. *See Steelworkers* v. *Enterprise Corp., supra* at 598. In his written opinion the Arbitrator referred to Articles I, II, IV(c), XIV, XVI, XVII and XVIII as the pertinent contract provisions, but examination of the reasons for his decision discloses no analysis of them for the purpose of determining whether Burke is entitled to reinstatement. There is, furthermore, no reference to any consideration by the Arbitrator to the "law of the shop" or the negotiations which led to the bargaining agreement. *Peerless Pr. Met. Corp.* v. *International U. of E., R. & M. W., supra* at 21. It appears that on the merits of the dispute the Arbitrator chose not to analyze certain relevant provisions of the agreement, most of which he cited, e.g., Articles II, IV(c), XIV, XVII and XXII(f); rather, he emphasized certain arbitration cases. The essence of his opinion is that Burke's case was not substantially unlike that of the grievant in a number of prior arbitration cases, and, although the Arbitrator conceded that most of the cases referred to situations in which the supervisor was returned to the bargaining unit by the employer over the union's objection, he found, nevertheless, in the light of these decisions that the Union here must be allowed to prevail.

Article II explicitly excludes supervisors from the coverage of the agreement. It is provided by Article IV(c), the provision relating to Union Security, that all employees must be members of the Union after 70 days "including former supervisor personnel who have been demoted by the Company into the bargaining unit". The management rights clause (Article XIV) retains for the defendant all the rights, powers and authorities of management of the employees "[e]xcept as otherwise expressly and specifically abridged, modified or provided in this Agreement . . . ." Article XXII(f) explictly provides that an employee promoted to be the "seventh (7th) working foreman" retains his status as an employee within the meaning of union security as of the date of his promotion. (Burke was not the seventh foreman under this Article.) Under the provisions of Article XVII, the Arbitrator had no authority to "add to, detract from, or in any way alter the provisions of this Agreement".

Consideration of the contract provisions, particularly those immediately referred to, requires the conclusion that the agreement is clear that management rights of whom to employ, and when to employ, "following the signing of this Agreement" (Article IV(c)) as such rights related to reinstatement of former supervisory personnel, were not bargained away by the defendant except in the case of the seventh working foreman. This result is not altered by the fact that Burke would be entitled, as the defendant concedes, to his accrued seniority rights if the defendant returned him to the bargaining unit. Further, this result is confirmed by the provisions of Article XXV which state the rights and opportunities of the parties to determine what subjects or matters should be covered by the agreement. It is not reasonable to believe that the status of the other six working foremen was not "within the knowledge or contemplation of either or both of the parties at the time they negotiated or signed [the] Agree-

ment". (Article XXV). If the parties believed that the "law of the shop" or their negotiations safeguarded to all working foremen the right to reinstatement in the bargaining unit, no explanation has been advanced and no reasonable explanation occurs to the court why the provision singling out the "seventh (7th) working foreman" was necessary. Both parties recognized that the total number of employees was a factor in their bargaining as to the "seventh (7th) working foreman", as it surely must have been when the contract did not give explicitly the same rights to the other six foremen.

Applying the foregoing standards in the light of the provisions of the agreement, the court concludes that the Arbitrator exceeded his authority in making the award in that it fails to draw "its essence from the collective bargaining agreement". *Steelworkers* v. *Enterprise Corp., supra* at 597. *See Torrington Co.* v. *Metal Products Workers Union Local 1645*, 362 F.2d 677 (2d Cir. 1966); *Magnavox Co. of Tenn.* v. *International U. of E., R. & M. W.*, 410 F.2d 388 (6th Cir. 1969).

In view of this conclusion, there is no need to reach the question of the validity of the clarification statement, so called.

The defendant's motion for summary judgment is allowed, and plaintiff's similar motion is denied.

/s/ Frank J. Murray
United States District Judge

Dated October 18, 1972

UNITED STATES DISTRICT COURT
DISTRICT OF MASSACHUSETTS

Civil Action No. 72-435-M

INTERNATIONAL UNION OF ELECTRICAL RADIO & MACHINE WORKERS, AFL-CIO, IN BEHALF OF ITSELF AND ITS LOCAL 209

v.

PEERLESS PRESSED METAL CORPORATION

JUDGMENT

October 18, 1972

MURRAY, DISTRICT JUDGE

This cause came on for hearing on cross-motions for summary judgment, and after arguments and consideration of the pleadings and affidavits the court having rendered its decision granting defendant's motion for summary judgment and denying plaintiff's similar motion, it is ORDERED

Judgment for the defendant vacating the arbitration award and subsequent clarification statement.

By the Court,

/s/ Robert J. Smith, Jr.
Deputy Clerk

/s/ Frank J. Murray
United States District Judge

APPENDIX C

VOLUNTARY LABOR ARBITRATION TRIBUNAL

Case Number:

IN THE MATTER OF THE ARBITRATION BETWEEN
LOCAL 209, I.U.E., AFL-CIO

— and —

PEERLESS PRESSED METAL CORPORATION

AWARD OF ARBITRATOR

THE UNDERSIGNED ARBITRATOR(S), having been designated in accordance with the Arbitration Agreement entered into by the above-named Parties, and dated March 24, 1970 and having been duly sworn and having duly heard the proofs and allegations of the Parties, AWARDS as follows:

1. Neither reasons of procedural or substantive arbitrability bar consideration of the grievance on its merits. The issue is found to be arbitrable.

2. On October 30, 1965, when Walter Burke was promoted out of the bargaining unit to the position of foreman he had a vested right to the seniority in the bargaining unit which he had accrued since the date of his hire in 1957. Upon the date of the loss of his foreman's job on September 11, 1970, Burke became entitled to reinstatement in the bargaining unit with such seniority as he had accrued up to the date of his promotion on October 30, 1965.

/s/ James V. Altieri
JAMES V. ALTIERI
Impartial Arbitrator

DATED: December 10, 1971)
STATE OF NEW YORK) ss.:
COUNTY OF NEW YORK)

On this 10th day of December, 1971, before me personally came and appeared JAMES V. ALTIERI, to me known and known to me to be the individual (x) described in and who executed the foregoing instrument and he acknowledged to me that he executed the same.

/s/ Alexander A. Miuccio
ALEXANDER A. MIUCCIO
Notary Public, State of New York
No. 69-7977878
Qualified in Worshester County
Cert. filed in New York County
Term Expires March 30, 1972

AMERICAN ARBITRATION ASSOCIATION

VOLUNTARY LABOR ARBITRATION TRIBUNAL

IN THE MATTER OF THE ARBITRATION BETWEEN
LOCAL 209, I.U.E., AFL-CIO

— and —

PEERLESS PRESSED METAL CORPORATION

OPINION

Pursuant to the provisions of the collective bargaining agreement between the parties dated March 24, 1970, the undersigned was designated as Arbitrator to hear and determine an unsolved dispute.

Upon notice duly given a hearing was held at the Offices of the American Arbitration Association, 294 Washington Street, Boston, Massachusetts, on August 24th, 1971, at which time the parties appeared and were given full opportunity to be heard, to present all evidence and proof, and to examine and cross-examine witnesses. A stenographic transcript of the proceedings was taken and thereafter post-hearing briefs were submitted by the parties, all of which have been read and duly considered.

The issues being submitted to arbitration arise out of the refusal of the Company to return William Burke into the bargaining unit after Burke had been laid off by the Company from his position as Foreman of the Spot Welding and Assembly Department on September 11th, 1970. Burke had entered the employ of the Company in 1957 as a member of the bargaining unit and was promoted to a supervisory position on October 30, 1965. On September 30th, 1970 the Union addressed a letter to John Mahoney, Jr., Vice President of the Company, which

together with the enclosure referred to in, it read as follows:

"Sept. 30, 1970

Peerless Pressed Metal Corp.
191 Rivington St.
Watertown, Mass.

Att.: Mr. John Mahoney, Jr., V.P.

Dear Sir: In regard to a letter received from Mr. William Burke, dated Sept. 29, 1970 requesting the union to grieve his layoff the Union does want him back in the bargaining unit and accuses the company of violation of contract covering seniority rights.

Respectfully yours,

EDWARD R. RENTA
Chief Steward, Local 209
IUE, AFL CIO"

"September 29, 1970

I.U.E. A.F.L.
C.I.O.—Local 209

Dear Sir and Brother: I have been laid off by the Company from my position as Foreman in the spot welding and assembly department. Since I have 13 years seniority, I sought to exercise my seniority and requested reinstatement into the bargaining unit. The Company has refused and I am therefore requesting the Union to grieve this matter.

Respectfully yours,

WILLIAM J. BURKE
Aggrieved Employee"

The union letter was delivered by hand by the Chief Steward and the President of the Local to Mahoney, who refused to accept it upon the grounds that Burke was not a member of the bargaining unit and was not an "employee" within the meaning of the agreement and had no standing to file a grievance. On October 6, 1970 the Chief Steward inquired of Mahoney whether the latter would be willing to conduct a top level meeting on the grievance. Mahoney again reiterated the same position. On October 22, 1970 the Union filed a demand for arbitration.

Thereupon the Company initiated correspondence with the American Arbitration Association in which it took the position that Burke was not an employee covered by the grievance and arbitration provisions of the collective agreement and that therefore there was no proper basis for processing the matter any further.

After exchange of further correspondence among the Company, the Union and the American Arbitration Association, on December 3rd, 1970, the Arbitration Tribunal addressed a letter to the Company advising it that it was not in a position to rule on the arbitrability or merits of a dispute, that such determination would be made by an Arbitrator unless the Union was restrained by a Court of proper jurisdiction, and that it intended to proceed with the appointment of an Arbitrator. Thereafter, the Company applied to the United States District Court for a stay of the arbitration which was denied and the Company thereupon appealed to the Federal Court of Appeals.

In the interim the undersigned was designated as Arbitrator in the matter and directed that the matter proceed to arbitration. The hearing was held on August 24th, 1971 and sometime after the conclusion of the hearing and while the matter was under consideration, the Court of Appeals affirmed the ruling of the lower

Court, denying the Company's application for a stay of arbitration.

At the hearing two issues were presented for determination. The first concerns whether the grievance presented by the Union on behalf of Burke is arbitrable. At all times prior to the hearing, the Company had based its contention that the matter was not arbitrable entirely on the contention that Burke had no standing as a laid off supervisor to file a grievance and to pursue it to arbitration. At the hearing the Company raised an additional contention with respect to arbitrability, this one on procedural grounds. It maintained that in any event the Union had failed to comply with the time limitations set forth in the grievance and arbitration articles and therefore the dispute could not reach arbitration.

The remaining issue, if the threshhold problem of arbitrability were surmounted by the Union, is whether the Company was contractually obligated to restore Burke to the bargaining unit.

PERTINENT CONTRACT PROVISIONS

"ARTICLE I

Pursuant to and in conformity with the National Labor Relations Act, as amended, the Company recognizes the Union as the exclusive bargaining agency covering wages, hours, and working conditions for the employees at its Watertown, Massachusetts, plant, to whom this Agreement applies."

"ARTICLE II

COVERAGE

This Agreement applies only to all production and maintenance employees of the Company at its Watertown, Massachusetts, plant, including the timekeeper,

but excluding office clerical employees, professional employees, guards and supervisors as defined in the Act."

"ARTICLE IV

UNION SECURITY

(c) All employees who are hired by the Company following the signing of this Agreement, including former supervisor personnel who have been demoted by the Company into the bargaining unit, must be members of the Union at the expiration of the seventy (70) day probationary period and must remain members of the Union in good standing as a condition of employment for the duration of this Agreement."

"ARTICLE XIV

MANAGEMENT

Except as otherwise expressly and specifically abridged, modified or provided in this Agreement, all rights, powers, and authorities of the Company in the Management of the business and its employees shall be retained by the Company."

"ARTICLE XVI

GRIEVANCES

(a) A grievance is defined to be any controversy between the Parties or between the Company and employees covered by this Agreement as to any matter involving the interpretation or application of any of the provisions of this Agreement.

(b) Any employee claiming a grievance may present his grievance to *his departmental foreman* at the time the grievance arises either by himself or with a shop steward who may also participate in the discussion.

(c) If the matter is not satisfactorily adjusted by the end of the following scheduled working day by the departmental foremen, then the grievance shall be presented in writing to the Superintendent or other designated representative of Management by the aggrieved employee and Chief Steward within the next three (3) working days. Failure to present such grievance within such time will mean that the grievance will be deemed to have been satisfactorily adjusted.

(d) If the matter is not satisfactorily adjusted within the next three (3) working days by the superintendent or other designated representative of Management, then it may be referred to Top Management (President, Vice-President, or other designated representatives of Management) by the grievance committee which shall consist of no more than the Local Union President, Vice-President, Chief Steward, and one other member of the bargaining unit, and/or a designated representative of the Union, within the next three (3) working days. Failure to present such grievance to Top Management within such time will mean that the grievance will be deemed to have been satisfactorily adjusted.

(e) If the matter is not satisfactorily adjusted within ten (10) working days, then it may be referred by either Party to arbitration as provided in a forthcoming Article.

"ARTICLE XVII

ARBITRATION

Either party shall have the right to refer any question involving the interpretation or application of the provisions of this Agreement which remain unsettled after having been fully processed through the provisions of Article XVI (Grievances) above, to arbitration under the rules of the American Arbitra-

tion Association, providing such request for arbitration is made to both the Company and the American Arbitration Association in writing within fifteen (15) days after the decision of the Company has been rendered in Step (e) of the grievance procedure set forth in Article XVI (Grievances) above. The decision of the arbitrator shall be in writing and shall be final and binding on all parties. The arbitrator shall have no authority to add to, detract from, or in any way alter the provisions of this Agreement. The costs of such arbitration shall be borne equally between the Company and the Union."

"ARTICLE XVIII

SENIORITY

(a) Seniority rights of employees as to layoffs and rehiring will be determined by the Company on a plant-wide basis and will include the following factors:

(1) Length of continuous service with the Company (2) Ability to perform adequately the work in the judgment of the Company. Where ability is comparable, those with the shortest length of service will be laid off first and rehired last.

(b) Employees lose all seniority rights if (1) they quit; (2) they are discharged for proper cause; (3) they do not report for work within four (4) days after written notice is sent them by the Company by certified or registered mail or by telegram addressed to their last known address appearing on its records; (4) they are absent for three (3) consecutive days without notifying the Company; and (5) they have been laid off and have not been re-employed within one (1) year.

(c) *Probationary Period:* All new employees shall be subject to a probationary period of seventy (70) days. During this period there shall be no seniority

among such employees. The Company may at its sole discretion discharge said new employees during this period without said discharge being subject to review by the grievance or arbitration provisions of this Agreement."

COMPANY POSITION

1. The agreement between the Company and the Union specifically applies only to production and maintenance employees and specifically excludes "supervisors" from the coverage and application of the agreement. The Company, therefore, is not required to arbitrate the question of its refusal to reinstate Burke, who admittedly was a supervisor, into the bargaining unit following his layoff as such supervisor and while, concededly, currently on layoff status as a supervisor.

2. The Union's failure to present its grievance to top management within the time limitations set forth in paragraph (d) of "ARTICLE XVI GRIEVANCES" of the collective bargaining agreement bars the Union from proceeding any further with the alleged grievance and arbitration of the matter.

The Company did not violate the provisions of the collective bargaining agreement in refusing to grant Burke's demand that he be returned to the bargaining unit on the basis of the seniority rights which he asserted.

The Company does not quarrel with the proposition that if Burke had been reinstated by it into the bargaining unit, then any claim he might have concerning his seniority rights allegedly accrued when he had been a member of the bargaining unit would be grievable and arbitrable. This would be so because he would then be an employee in the bargaining unit and covered by the grievance and arbitration provisions of the agreement. It would not be so while he was in a supervisory status or while currently on layoff status as a supervisor.

For this reason the cases cited by the Union in support of the proposition that supervisors who, in fact, return to the bargaining unit may exercise seniority rights that had accrued up to the point when they had been promoted into a supervisory position are completely inapposite. These simply are cases in which management exercised its management rights to hire and place people in the work force and once that had been done, then the individual achieved the status of an "employee" who would be entitled to file grievances and assert rights claimed to exist under the collective agreement. To permit a supervisor to file a grievance and assert rights under the collective bargaining agreement while he is still a supervisor because of alleged accrual of seniority during the period that he had been an employee in the bargaining unit would be to put the cart before the horse.

If the Company did elect to demote a supervisor into the bargaining unit, it is clear under the terms of the agreement that the demoted supervisor would be a new employee required to go through the 70-day probationary period as provided in Article XVIII (c). Therefore, even were the Company to elect to demote a supervisor to the bargaining unit he would have no seniority. Article IV Section (c) makes clear that reference to "who have been demoted by the Company" and "who have been hired by the Company" is based on the understanding that such actions are Company prerogatives.

Insofar as procedural arbitrability is concerned since the request for a top level meeting which was made by the Union Steward on October 6th was not made within three working days next following the date of the grievance on September 30, 1970, the grievance, in accordance with Article XVI (d), must "be deemed to have been satisfactorily adjusted".

UNION POSITION

Article XVI (a) states that a grievance is "any controversy" between the parties as to "*any* matter involving the interpretation or application of *any* of the provisions of this agreement." [Emphasis supplied]. Article XVII, gives either party the right to refer "*any* question involving the interpretation or application of the provisions of this agreement" to arbitration.

The subject of reinstatement of employees into the bargaining unit is not specifically excluded from the scope of the arbitration clause and under the well known Supreme Court trilogy it is clear that where parties have agreed that all questions involving the interpretation or application of an agreement are subject to arbitration, they may avoid arbitration of a given matter only by specifically excluding that matter from the scope of the arbitration provisions.

The Union bases its contention on an interpretation of the seniority provision, namely that the seniority article by not including promotion to a supervisory position as one of the enumerated ways in which seniority rights may be lost gave Burke the right to assert the accrued seniority rights he had as of the time he left the bargaining unit. That this issue is arbitrable is therefore clear. Furthermore, the Arbitrator is bound by the Court ruling that the issue is arbitrable.

On the merits the bulk of arbitrable precedents favor the proposition that when the contract is silent on the subject, an employee who is promoted out of the bargaining unit to a supervisory position retains his accrued seniority rights and may return to the bargaining unit when he is laid off in his supervisory position. The Company's "cart before the horse" theory is without merit. If Burke has any seniority rights to exercise to return to the bargaining unit, these rights are derived

solely and exclusively from the language contained in the collective bargaining agreement. The rights, if they are present, are neither strengthened nor diminished by the fact that it is the Union that seeks his reinstatement rather than the Company.

DISCUSSION

Procedural Arbitrability

John Mahoney, the Vice President of the Company, to whom the grievance was submitted and who rejected it, testified unequivocally that the sole reason for refusing to entertain the grievance was the consideration that Burke was a laid off supervisor who had no standing to file a grievance. This was the only reason advanced by the Company in its communications with the American Arbitration Association and before the United States District Court in support of its contention that the grievance was inarbitrable.

It would appear that as soon as the problem came to the attention of the Union, the Chief Steward and the Union President, acting as a grievance committee, bypassed the usual preliminary steps of the grievance procedure and appealed directly to top management. There is no indication that any objection was taken to this procedure as such. Steps (b) and (c) of Article XVI were clearly by passed.

The Company maintains that the Union failed to present its grievance to top management within the time limitation set forth in paragraph (d) because more than three days elapsed from the time the grievance was originally presented on September 30th and the request for a top level meeting on October 6th, 1970. The three day limit set forth in (d), however, has application only to the length of time an appeal from the (c) level could be

permitted to go unanswered without the resultant terminal consequence.

Actually there was no appeal from the Superintendent level (c). The grievance was submitted directly to top management which is defined in Article XVI (d) as including the President and Vice President. When the grievance was submitted to Mahoney, the Vice President, he gave no indication that he was rejecting it because of failure to first process it through the earlier steps. Had he done so, the Union which claims it first became aware of the problem on September 30th, 1970, would have had ample time to pursue it in the usual manner.

Under such circumstances, it is not believed that it would do violence to the procedure agreed upon by the parties to treat the original submission of the grievance by the Union President and Chief Steward to the Company's Vice President, on September 30th, as a referral to top management sufficient to justify a period of ten days under Step (e) and after that had been exhausted, fifteen days within which to bring it to arbitration under Article XVII.

The grievance article and the time limitations established are based on the contractually expressed premise that failure to present the grievance at each successive step within the time therein provided will be deemed to mean that the grievance was satisfactorily adjusted. No basis for the operation of this presumption can be found in the particular circumstances attending the manner in which the grievance here involved was handled. The Company's contention that the three working day time limitation set forth in paragraph (d) of Article XVI bars further consideration of the grievance is rejected.

Substantive Arbitrability

The principal contention by the Company is that Burke, in the period between his layoff on September 11, 1970, and the filing of the grievance on September 30th, 1970 and, indeed, at all times thereafter was a supervisor, albeit a laid off supervisor, and was not and is not an "employee" within the meaning of the collective bargaining agreement. Therefore, it is argued, the terms and provisions of the collective bargaining agreement, including the right to submit grievances and go to arbitration have no application to him.

The Company and the Union have engaged in spirited controversy as to whether Burke had standing to file a grievance. Essential to the Company's "cart before the horse" theory is the concept that the party pursuing the grievance here is an individual who, by reason of the Company's refusal to exercise the managerial option to return him to the bargaining unit, had failed, as a consequence, to resume the status of "employee" within the meaning of the collective bargaining agreement and was therefore not in a position to pursue the grievance.

The undersigned does not believe that a definitive and categorical resolution of the question of Burke's precise status while on layoff and before reinstatement is necessarily crucial to the issue of arbitrability.

Article XVI (a) defines a grievance not only as a controversy "between the Company and employees covered by this agreement", which is the phrase emphasized by the Company, but also defines a grievance as "any controversy between the parties" as to any matter involving the interpretation or application of any of the provisions of the agreement. When the Union wrote its letter and presented it to Mahoney on September 30th, it was presenting a controversy between it and the Company in stating that it, the Union, "accuses the Company of vio-

lation of contract covering seniority rights". There was clearly, at this point, a controversy between the Union and the employer involving a matter of contract interpretation. Surely the Union, entrusted with the responsibility for administering the collective bargaining agreement, should be in a position to raise questions concerning the alleged violation of the collective agreement by the Employer. This would be so regardless of the merit or lack of merit of the grievance it presents.

Viewed from this angle, there is no need fundamentally, to hurdle the objection posed by the Company that Burke, personally, has no standing to be heard. In any event, however, the Union maintains that if Burke has seniority rights that must be respected, these are meaningful only if they can be exercised by way of reinstatement to the bargaining unit. While this is urged essentially in connection with the underlying merits of the controversy, it also is inextricably interwoven with the question of substantive arbitrability. Assuming, for purposes of the arbitrability issue, that the contract grants Burke seniority rights as of the time he first left the bargaining unit, isn't this tantamount to agreement that upon being separated from his supervisory position, he was to automatically resume his status as an employee of the bargaining unit and, therefore, could grieve if his rights were not accorded to him.

As previously indicated, if the contract, reasonably construed, is found to have vested seniority rights in an individual, the rights would be meaningless if the privilege to grieve over their denial were made contingent upon the Employer's election to first restore him to the bargaining unit.

In any event, however, assuming that there is some valid infirmity that arrested Burke's right to assert his accrued seniority rights while in the bargaining unit be-

cause, as the Company contends, he was a laid off "supervisor" at the time, and needed entrance into the bargaining unit *before* these rights could be asserted by him, does it follow that the Union likewise lacks status to present its controversy with the Company over a situation in which it disagrees that it is optional with the Company whether to reinstate or not and asserts that the contract mandates that the Company should be directed to permit Burke's return to the bargaining unit.

The undersigned is persuaded that neither reasons of procedural or substantive arbitrability bar consideration of the grievance on its merits.

The Merits of the Grievance

The Union has cited a large number of cases in which seniority provisions similar to those found in the contract in the case at bar were involved and the contract was silent as to the right of a former member of the bargaining unit who had become a supervisor to return to it when laid off from his managerial position. The Arbitrators who adopt what has been referred to as the majority rule, agree in the cases cited, that where a contract does not expressly provide that promotion to a supervisory position results in loss of seniority, the employee retains the seniority rights which had vested up to that time. See *Freuhauf Corp.*, 54 L.A. 1093; *Gibson Corp.*, 50 L.A. 1053; *Babcock & Wilcox Co.*, 48 L.A. 1234; *Alpha Portland Cement*, 40 L.A. 495; *Ohio Valley Baking Co.*, 44 L.A. 673; *Signal Oil & Gas Co.*, 43 L.A. 97; *Northwest Co.*, 42 L.A. 961; *Pannier Corp.*, 41 L.A. 1228; *Hooker Chemical Corp.*, 36 L.A. 857; *Reliance Electric & Engineering Co.*, 31 L.A. 200.

The Company maintains the cases cited by the Union have limited bearing in situations such as the one before us where the Union, rather than the Employer, is the protagonist, and hence do not cast any light on the issue

of the Employer's right of election to reinstate or not to reinstate. It cites a substantial number of cases that it maintains support its position. See *Screw Conveyor Corp.*, 5 L.A. 560; *King Power Co.*, 1 L.A. 215; *Pittsburgh Plate Glass Co.*, 8 L.A. 572 at 578; *Geneva Steel Co.*, 15 L.A. 836; *Aerometer Co.*, 30 L.A. 666; *Tin Processing Corp.*, 16 L.A. 49; *Sangamo Electric Co.*, 25 L.A. 457; *Singer Manufacturing Co.*, 22 L.A. 492.

The point of view that where the contract does not *expressly* provide for return to the bargaining unit by a demoted supervisor, he has no right to reinstatement, is expressed by Arbitrator *Sylvester Garrett* in *Geneva Steel Co.*, supra, in which he states: ". . . . an employee once promoted to a supervisory position can return to his former job in the bargaining unit only if this is permitted by an express local agreement or by an established practice".

The Company maintains that the cases cited by the Union do not stand for the proposition that a Company is compelled to reinstate a supervisory employee in the bargaining unit when he is separated from his supervisory position. The Company argues that the cases relied on simply constitute rulings that once a supervisor is, in fact, returned to the bargaining unit by exercise of the Company discretion to do so, then he reacquires status as an employee within the bargaining unit and then the question becomes relevant as to how much seniority he may then exercise.

It is in this context, urges the Company, that rulings have been made concerning whether seniority accrues up to the point of departure from the bargaining unit or, in some cases, even while in the management position. The cases do not stand for the proposition, argues the Company, that a laid off supervisor like Burke either is entitled to file a grievance or that the Company is *required* to reinstate him.

The cases cited by the Union and the Company in their respective briefs have been carefully reviewed by the undersigned Arbitrator. It appears clear that the strongly preponderent view and one reflecting the current trend of thinking among arbitrators, is that, in cases such as the one at bar, where the contract is silent on the subject, promotion to a supervisory role will not be deemed to result in the loss of the seniority accumulated up to that point.

Granting, therefore, that Burke had vested seniority rights when he left the bargaining unit, does the possession of those rights at the time he leaves his supervisory position give him a right to return to bargaining unit and create a corresponding obligation on the part of the Company to reinstate him. It is true that most of the cases cited by the Union constitute situations in which the Employer did return a supervisor to the bargaining unit and that it was the Union that challenged the propriety of the Company action. Careful study of these cases, however, indicates that the holdings do not support the Company contention that the matter of the return of a supervisor to the bargaining unit in such cases is purely a matter of discretion for the Company to determine at its option.

Most of the cases relied upon by the Union reflect an underlying assumption that in reinstating the returning supervisor, the Company was giving recognition to a right of the supervisor to be returned to the bargaining unit. The reference to the vested seniority *rights* of the returning supervisor as antecedent justification for the return clearly reflects this basic assumption.

Thus, for example, in the case cited of *Babcock & Wilcox Company*, 48 L.A. 1234, the grievance filed by a discharged supervisor seeking readmission to the bargaining unit was held to be arbitrable. The Arbitrator stated at page 1238:

> "It is unreasonable to suppose that retained seniority rights have any value if they depend solely upon the convenience or desire of the Employer. A transfer back to an hourly rated job cannot be left solely in the discretion of the Employer."

In conclusion, it is found that Burke had vested seniority rights accrued as of the time of his leaving the bargaining unit, which gave him and the Union, on his behalf, the right to insist upon his reinstatement in the bargaining unit with such seniority as had vested as of the time of his promotion.

The Company's argument that the provisions of Article IV (c) prevent crediting Burke with the seniority he had accrued as of the time of his leaving the bargaining unit, and require treating him as a new hire at the option of the Company, is rejected. The provision cited does not mean that an individual demoted by the Company into the bargaining unit has no seniority and therefore must be treated as a new employee whose hiring or non-hiring is solely within the discretion of the Company. The section, insofar as the former supervisory personnel referred to, means that a former supervisor must, within seventy days after his return to the bargaining unit, become a member of the Union in good standing under the Union security clause. That the section was not intended to create a new probationary period, as such, for demoted supervisors appears evident from the terms of Article XVIII (c). No employee is required to duplicate any portion of his probationary period that is completed even though his employment in the bargaining unit may be interrupted by layoff or, as here, by service in a non-bargaining unit job.

/s/ James V. Altieri
JAMES V. ALTIERI
Impartial Arbitrator

IN THE ARBITRATION MATTER BETWEEN

LOCAL 209, I.U.E., AFL-CIO

— and —

PEERLESS PRESSED METAL CORPORATION

On December 23, 1971, the Union through its counsel, Michael A. Feinberg, Esq., pursuant to Section 8 Chapter 150 C of the General Laws of the Commonwealth of Massachusetts, submitted a request for clarification of the award issued by the arbitrator on December 10, 1971 in that the award as framed makes no express reference to the matter of compensation from the date of the Company's refusal to reinstate the grievant, Walter Burke, up to the present.

In his letter dated January 3, 1972, Julius Kirle, Esq., counsel for the Company, objects to the request of Mr. Feinberg upon the grounds that:

> "(1) Section 8 of Chapter 150 C of the General Laws of the Commonwealth of Massachusetts is not applicable; and in any event the requirements thereof have not been met;
>
> (2) The Award having been made on the issue presented to the Arbitrator, it is respectfully submitted that the Arbitrator has no authority to re-open the matter, and it must be considered closed insofar as the Arbitrator is concerned.
>
> (3) The Arbitrator is without authority to reopen the matter once his Award has been made without joint agreement of both parties, and here there is no such agreement."

I agree with Mr. Kirle that the award having been issued, the arbitrator is without authority to reopen the hearings without the consent of the Company. I do not

construe the request of Mr. Feinberg, however, as one to reopen the hearings or to modify the award. The application on behalf of the Union is not to reopen the hearings which, when timely done, would be, if at all, for the purpose of gaining leave to introduce newly discovered evidence or further argument directed to the merits of the controversy.

The Union's objective as is evidenced by the letter from Mr. Feinberg is to clarify the award. His reliance upon Section 8 which in turn refers to Section 12 of Chapter 150 C of the General Laws of the Commonwealth of Massachusetts makes clear that he is maintaining that "the award is imperfect in a matter of form, not affecting the merits of the controversy." Chapter 150 C, Section 12 (3).

The imperfection in the award which the Union urges should be remedied is its silence in the matter of a specific remedy including a direction to reinstate, in terms, and some provision with respect to whether he is as a result entitled to compensation for monies which he would have received had he been reinstated on the date in question but did not by reason of the failure of the Company to return him to the bargaining unit. While the arbitrator originally framed the award in the manner he did because it appeared to be directly responsive to the issues as framed by the unresolved grievance and the Company reasons for its rejection, it appears upon further reflection that that which he considered implicit in the wording of the award should have been made explicit.

Clearly implied in the award is the requirement that since Burke became entitled to reinstatement in the bargaining unit on September 11, 1970, the Company must reinstate him effective as of that date. Furthermore, reinstatement effective as of September 11, 1970 clearly contemplates the restoration of Burke to the rights he

would have enjoyed as an employee in the bargaining unit as of September 11, 1970 including the fundamental right to be employed and to earn the wages due him for the position to which he should have been restored.

It appears further reasonably implicit, therefore, in the award that was rendered and this is what was intended, that Burke should be made whole for any loss of pay representing the difference between what he would have earned had he been restored, as he was entitled to, to the bargaining unit on September 11, 1970, and that which he has earned in the interval between that date and the date he is offered reinstatement.

The foregoing was the intent of the arbitrator in the award that was issued.

/s/ James V. Altieri
JAMES V. ALTIERI
Impartial Arbitrator

Dated: January 20, 1972

STATE OF NEW YORK)
) ss.:
COUNTY OF NEW YORK)

On this 20th day of January, 1972, before me personally came and appeared JAMES V. ALTIERI, to me known and known to me to be the individual described in and who executed the foregoing instrument and he acknowledged to me that he executed the same.

/s/ Alexander A. Miuccio
ALEXANDER A. MIUCCIO
Notary Public, State of New York
No. 69-7977878
Qualified in Worshester County
Cert. filed in New York County
Term Expires March 30, 1972

APPENDIX D

Labor Management Relations Act, 1947, as amended, Sec. 301 (a), 29 U.S.C. 185 (a):

Suits for violation of contracts between an employer and a labor organization representing employees in an industry affecting commerce as defined in this Act, or between any such labor organizations, may be brought in any district court of the United States having jurisdiction of the parties, without respect to the amount in controversy or without regard to the citizenship of the parties.

UNITED STATES ARBITRATION ACT, 1925, as amended, Sec. 10, 9 U.S.C. 10:

In either of the following cases the United States court in or for the district wherein the award was made may make an order vacating the award upon the application of any party to the arbitration—

(a) Where the award was procured by corruption, fraud, or undue means.

(b) Where there was evident partiality or corruption in the arbitrators, or either of them.

(c) Where the arbitrators were guilty of misconduct in refusing to postpone the hearing, upon sufficient cause shown, or in refusing to hear evidence pertinent and material to the controversy; or of any other misbehavior by which the rights of any party have been prejudiced.

(d) Where the arbitrators exceeded their powers, or so imperfectly executed them that a mutual, final, and definite award upon the subject matter was not made.

(e) Where an award is vacated and the time within which the agreement required the award to be made has not expired the court may, in its discretion, direct a rehearing by the arbitrators.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the First Circuit

BRIEF OF RESPONDENT INTERNATIONAL UNION OF ELECTRICAL, RADIO AND MACHINE WORKERS, AFL-CIO, AND ITS LOCAL 209 IN OPPOSITION

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1973

No. 73-72

PEERLESS PRESSED METAL CORPORATION,
Petitioner,

v.

INTERNATIONAL UNION OF ELECTRICAL, RADIO & MACHINE WORKERS, AFL-CIO, IN BEHALF OF ITSELF AND ITS LOCAL 209,
Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the First Circuit

---

BRIEF OF RESPONDENT INTERNATIONAL UNION OF ELECTRICAL, RADIO AND MACHINE WORKERS, AFL-CIO, AND ITS LOCAL 209 IN OPPOSITION

OPINIONS BELOW

The opinion of the court of appeals holding that the district court properly ordered arbitration of the grievance is reported in 451 F.2d 19, and is reproduced as an appendix hereto, pp. 1a to 5a, *infra.*

The opinion of the court below enforcing the arbitration award is not officially reported, but is unofficially reported in 82 LRRM 8089 and reproduced as Appendix A to the petition for a writ of certiorari (pp. A-1 to A-2).[1] Two separate denials by Mr. Justice Brennan of the application for stay of the order of the court below enforcing the arbitration award were not accompanied by any opinion. (Application No. A-1077, filed April 25, 1973, denied April 26, 1973, and reapplication No. A-1077, filed on July 6, 1973, denied July 10, 1973).

The opinion of the district court setting aside the arbitration award is not reported but is reproduced as Appendix B to the petition (pp. A-3 to A-8). The opinion (pp. A-12 to A-29), award (pp. A-10 to A-11) and clarification of award (pp. A-30 to A-32) of the arbitrator are reproduced as Appendix C to the petition.

QUESTIONS PRESENTED

1. Whether a decision by the court of appeals, in proceedings to enjoin arbitration, that the collective bargaining agreement was susceptible of the interpretation urged by the grievant, precludes the district court, in proceedings to enforce the ensuing arbitrator's award, from setting aside the award on the ground that the collective bargaining agreement was not susceptible of such interpretation.

2. Whether the court of appeals had the power to assess the employer with attorneys fees incurred by the union in the district court in a suit brought by the union under Section 301 of the Labor Management Relations Act, 29 USC 185, where the court of appeals found

---

[1] References to the appendices to the petition for a writ of certiorari are designated as pp. A—.

that the suit was necessitated by the intransigence of the employer in resisting enforcement of the arbitration award, after the court of appeals had ruled in the suit to enjoin arbitration that the collective bargaining agreement was susceptible of the interpretation adopted by the arbitrator.

STATEMENT OF THE CASE

The facts

The Peerless Pressed Metal Corporation, hereinafter called the Company, and the International Union of Electrical, Radio and Machine Workers, AFL-CIO, hereinafter called the Union, at all times here material have been parties to a collective bargaining agreement which by its express terms "applies only to all production and maintenance employees of the Company * * * excluding * * * supervisors" (pp. A-15 to A-16).

William J. Burke was hired by the Company on August 18, 1952 as a production employee and continued for the next 13 years to work as a production employee in the bargaining unit covered by the successive collective bargaining agreements between the Company and the Union (pp. A-3, A-12). On or about October 30, 1965, Burke was promoted to a supervisory position (p. A-12).

Burke continued to be employed by the Company in a supervisory position until September 11, 1970 when he was laid off (p. A-12). Burke immediately invoked his 13 years of seniority in the bargaining unit and on the basis thereof, claimed a right to reinstatement into the bargaining unit (p. A-18). The Company refused his request (p. A-13). Burke then requested the Union to grieve the Company's refusal to reinstate him (p.

A-13). The Union accordingly wrote the Company stating that the Union wanted Burke returned to the bargaining unit and accused the Company of violating the provisions of the collective bargaining agreement governing seniority rights by failing to reinstate Burke (p. A-13). The Company refused the Union's request and the Union invoked arbitration (p. 14).[2]

In accordance with the provisions of the collective bargaining agreement that arbitration shall be under the rules of the American Arbitration Association (pp. A-17 to A-18), the Union initiated correspondence with the American Arbitration Association to secure the appointment of an arbitrator (p. A-14). The Company wrote the American Arbitration Association stating that the Company did not consider the grievance arbitrable and opposing the appointment of an arbitrator (p. A-14). The American Arbitration Association advised the Company that issues of arbitrability would not be decided by the Association and that the Association would name an arbitrator (p. A-14). Although the Company instituted a suit to enjoin arbitration, the American Arbitration Association proceeded, without

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[2] Burke did not himself file a grievance. The collective bargaining agreement authorized the Union itself, as distinguished from an employee, to obtain resolution through the grievance procedure of "any controversy between the Parties * * * as to any matter" involving the interpretation or application of any of the provisions of this Agreement" (p. A-16). Arbitration is available to "either party" with respect to "any question involving the interpretation or application of the provisions of this Agreement" (p. A-17). The court of appeals in affirming the order directing arbitration quoted this language (451 F.2d at p. 20, p. 2a, *infra*) and the arbitrator found it unnecessary to determine whether Burke could grieve for the arbitration had been invoked on the Union's grievance (pp. A-24 to A-25).

awaiting final resolution of the injunction suit, to appoint James V. Altieri as arbitrator (pp. A-14, A-29).

The suit to enjoin arbitration

The Company filed an action for declaratory judgment in the United States District Court for the District of Massachusetts seeking to enjoin the arbitration (p. 1a, *infra*).[3] The district court denied the injunction and entered an order directing arbitration (pp. 1a-2a, 5a, *infra*).

The opinion of the court below on arbitrability

The order of the district court directing arbitration was appealed by the Company to the Court of Appeals for the First Circuit which affirmed the judgment of the district court. *Peerless Pressed Metal Corp.* v. *I.U.E.*, 451 F.2d 19 (1st Cir., 1971) (pp. 1a-5a, *infra*). The court of appeals, for the purpose of determining arbitrability, considered both the issue of whether the collective bargaining agreement was susceptible of the interpretation that the Union could grieve the Company's failure to accord Burke the seniority he accrued during his 13 years in the bargaining unit, and if so, of whether there could be an interpretation of the agreement providing for the reinstatement of Burke. The court held that it was possible for the arbitrator to rule in favor of the Union on both points. With respect to the right of reinstatement, the Court of Appeals carefully analyzed the pertinent language of the collective bargaining agreement and concluded that "the agreement could be read as entitling [Burke] to reinstate-

[3] References designated by an arabic numeral followed by a small a, as p. 1a, are to the opinion of the court below in the proceedings to enjoin arbitration which is printed as an appendix to this brief.

ment". (451 F.2d at p. 21, p. 5a, *infra*). In support of this conclusion the court relied upon the fact that the collective bargaining agreement set forth the conditions under which employees lose seniority rights, but that promotion to a supervisory position is not among the listed bases for losing seniority (451 F.2d at p. 20, p. 3a, *infra*). The court stated (451 F.2d at p. 20, p. 3a, *infra*):

> "In particular, the notion that seniority is inextricably intertwined with the right to reinstatement provides, in our view, a basis for an interpretation favorable to Burke of the word 'employee' in the coverage clause. The argument would be that under the agreement supervisors retain seniority accrued before their promotions and that, therefore, they remain employees for the purpose of exercising seniority rights and their right of reinstatement, like that of other employees, is determined solely by their seniority."

The court noted that the collective bargaining agreement showed that the parties contemplated that demoted supervisors would return to the unit because in the maintenance of membership clause, there was an express provision requiring union membership of "former supervisory personnel who have been demoted by the Company into the bargaining unit" (451 F.2d, at p. 21, pp. 4a-5a, *infra*).

In addition, the court of appeals relied upon the express provision that an employee promoted out of the bargaining unit to be the seventh foreman retains his seniority rights accrued while working in the unit and upon demotion will "revert to his previous status" (451 F.2d at p. 21, pp. 3a, 4a-5a, *infra*), as showing that the parties did not regard supervisory status as inconsistent

with retention of employee rights under the collective bargaining agreement.[4]

After analyzing the contract language which even to a nonexpert afforded basis for sustaining the grievance, the court of appeals pointed to two lines of decisions involving labor management expertise which similarly would support the construction of the language of the collective bargaining agreement sought by the Union. Decisions of both the National Labor Relations Board that laid-off employees retain seniority rights and of arbitrators that supervisors retain seniority rights were cited. The court stated (451 F.2d at p. 21, p. 4a, *infra*):

> "We note that, under settled law, a laid-off employee is still an employee. Burke is arguably in a status akin to, if somewhat different from, that of a laid-off employee. He is willing to work though not now working and arguably possesses

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[4] The context in which the provision respecting the seventh foreman appears supports the view that the Union and the Company assumed that all foreman promoted from the ranks retained seniority in the bargaining unit while holding a supervisory position. The language appears in Article XXII entitled General Provisions, Paragraph (f), which is a long paragraph placing numerous restrictions on work by supervisors, aimed at preserving work for employees in the bargaining unit. With respect to the ratio of foremen to rank and file employees, the paragraph reads, "As of the date of the signing of this Agreement there are six (6) working foremen. The seventh (7th) may be added provided that the Company promotes from within the ranks of the regular employees, and the number of union and probationary employees total seventy (70) or more. If the total of union and probationary employees is reduced below seventy (70) the seventh (7th) working foreman would revert to his previous status (regarding union seniority to date of his promotion)." This appears at p. 27 of the appendix filed in the court of appeals. The clerk of that court has been requested to certify a copy to this Court.

certain rights which have accrued to him, *qua* employee, under the collective bargaining agreement. This position has been taken in several arbitrators' decisions which, while they deal with different collective bargaining agreements and do not in any event bind us, suggest that the mode of analysis is not inconceivable to those involved in labor-management relations." (footnotes omitted)

The arbitrator's opinion and award

The arbitrator wrote a careful opinion in which he ruled that the grievance was arbitrable both as a Union grievance and as the individual grievance of Burke (pp. A-24, A-25). In so ruling the arbitrator pointed out that an interpretation of the provisions of the collective bargaining agreement for purposes of the issues of arbitrability here invoked necessarily involved the resolution of the issue on the merits. He characterized "the underlying merits of the controversy" as "inextricably interwoven with the question of substantive arbitrability" for a construction "for purposes of the arbitrability issue, that the contract grants Burke seniority rights as of the time he first left the bargaining unit," leads to the result "that upon being separated from his supervisory position, he was to automatically resume his status as an employee of the bargaining unit" (p. A-25).

After a thorough analysis of all the applicable provisions of the collective bargaining agreement (pp. A-15 to A-26, A-28 to A-29) the arbitrator entered an award that (p. A-10):

"On October 30, 1965, when * * * Burke was promoted out of the bargaining unit to the position of foreman he had a vested right to the seniority in the bargaining unit which he had accrued since the date of his hire * * *. Upon the date of the loss

of his foreman's job on September 11, 1970, Burke became entitled to reinstatement in the bargaining unit with such seniority as he had accrued up to the date of his promotion on October 30, 1965.

The setting aside of the award by the district court

The Company refused to comply with the award. In proceedings filed in the United States District Court for the District of Massachusetts by the Union under Section 301 of the Labor Management Relations Act, 29 USC 185, the court set aside the award on the ground that "the Arbitrator exceeded his authority in making the award in that it fails to draw 'its essence from the collective bargaining agreement'. *Steelworkers* v. *Enterprise Corp., supra* at 597. See *Torrington Co.* v. *Metal Products Workers Union Local 1645,* 362 F.2d 677 (2d Cir. 1966); *Magnavox Co. of Tennessee* v. *International U. of E., R. & M. W.,* 410 F.2d 388 (6th Cir. 1969)," (p. A-8).

The decision below by the court of appeals

On appeal by the Union to the United States Court of Appeals for the First Circuit, the court reversed the district court in a per curiam opinion which directed enforcement of the arbitrator's award and an award to the Union of the attorneys fees it incurred in the district court proceedings to enforce the award (pp. A-1 to A-2). With respect to the merits, the court of appeals stated (pp. A-1 to A-2):

> "In *Peerless Pressed Metal Corp.* v. *IUE,* 1 Cir., 1971, 451 F.2d 19, we must necessarily have ruled, by requiring arbitration of the issue between the parties, that a decision in favor of the union would not violate the collective bargaining contract on its face. The district court's refusal to enforce the award in its favor, from which refusal the union now appeals, was based on a con-

> trary view of the proper construction of the contract. In light of *Peerless,* this was no longer a permissible conclusion. The only question before the district court was whether the arbitrator's choice was, by reason of some circumstance outside the contract itself, 'so palpably faulty that no judge, or group of judges, could ever conceivably have made such a ruling.' *Safeway Stores* v. *Bakery Workers Local 111,* 5 Cir., 1968, 390 F.2d 79, 82. The arbitrator's careful decision could not be so viewed."

The award to the Union of its attorney's fees was based on the court's finding that the "intransigence" of the Company "in resisting enforcement of the arbitration award, made after" the opinion of the court of appeals on the arbitrability issue, justified requiring the Company to pay the attorney's fees incurred by the Union, but only in the district court proceedings for enforcement (p. A-2). The court did not award the Union attorney's fees resulting from the appeal to the court of appeals because in the court's view such an award would not be fair in view of the success of the Company in the district court.

REASONS FOR DENYING THE WRIT

1. This case does not afford an opportunity to this Court to resolve the appropriate standard of review of arbitration awards.

If the difficulties as portrayed by the petition (pp. 6-11) which some courts seem to be having in applying the standard for review of arbitration awards enunciated by this Court in the *Steelworkers'* "trilogy",[5] require guidance from this Court, the

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[5] *Steelworkers* v. *American Mfg. Co.*, 363 U.S. 564 (1960); *Steelworkers* v. *Warrior & Gulf Navigation Co.*, 363 U.S. 574 (1960); *Steelworkers* v. *Wheel & Car Corp.*, 363 U.S. 593 (1960).

instant case does not afford an appropriate vehicle. This case presents the unique situation that the issue of arbitrability was governed by the same construction of the same contract language as the issue of the merits of the grievance. The court of appeals in determining arbitrability ruled that the provisions of the agreement permit the "possible" inference that a supervisor retains seniority gained in the unit and reverts to that seniority on loss of his supervisory status (451 F.2d 21, pp. 4a, 5a, *infra*). The court of appeals in its first opinion held this possible construction was applicable both to decision of the grievon the merits and to the decision of arbitrability (451 F.2d at 20-21, p. 5a, *infra*).

The arbitrator explained in his opinion that the resolution of this seniority issue caused the inextricable intermingling of the issue of arbitrability and the issue of the merits (p. A-25). And in enforcing the award the court of appeals held that its ruling in its first opinion that such a construction of the contract would not violate the collective bargaining agreement, meant that the Company could not, in a second suit, attack the arbitration award solely on the ground that the contract was not susceptible of this construction (pp. A-1 to A-2).

There is nothing in the opinion of the court below which either expressly or by implication suggests that a holding that a grievance is arbitrable operates to narrow in any respect the issues open to any party in proceedings to review the award, except only an issue which was necessarily decided in the determination of arbitrability. The court of appeals thereby applied traditional principles of *res judicata*.

Nowhere in the petition is there any contention that the Company raised any issue as to the validity of the award which had not been decided by the court of appeals in ruling that the grievance was arbitrable. Hence the Company's attack on the judgment below is necessarily an attack on established principles of *res judicata*. We cannot believe this Court is interested in reviewing this issue.

2. The decision below presents no conflict with any decision of this Court or with any of the courts of appeals.

The petition has failed to point to any decision of this Court or any court of appeals where this Court or the court of appeals has refused to apply the *res judicata* principle in reviewing an arbitration award attacked solely on grounds previously decided in prior litigation between the same parties involving issues of arbitrability.

3. The arbitrator's award was so clearly correct that its enforcement presents no issue deserving review.

If we are wrong in our contention that the decision below was governed by principles of *res judicata* rather than principles of standards for enforcement of arbitration awards, we suggest that the arbitration award was so clearly correct as to make it unlikely that this Court would choose this case for the purpose of clarifying standards for enforcement of arbitration awards.

The arbitration award applies the same principles governing seniority rights of employees who seek to move back and forth between nonsupervisory and supervisory positions as the majority of arbitrators dealing with similar contractual language. The arbitrator here explained in his opinion how Burke's right to reinstatement was spelled out of the various pro-

visions of the collective bargaining agreement, including the language providing seniority rights for employees, accompanied by a careful listing of the ways seniority rights may be lost, which did not include any provision that promotion to supervisor was a way of losing seniority (pp. A-25 to A-29). The court below in its opinion enforcing arbitration had held the contract language could be so construed and cited arbitration awards reaching the same result (451 F.2d at 21, fn. 3, p. 4a, *infra*). In addition to the arbitration awards cited by the court below see *Rodman Industries, Inc.*, 59 LA 101 (George R. Fleischil, arbitrator 1972); *Hawaiian Telephone Co. and IBEW*, 59 LA 366 (Joel Seidman, arbitrator 1972); *Gartland-Haswell Foundry Co.*, 60 LA 1061 (David L. Kabaker, arbitrator 1973); *Fruehauf Corp.*, 54 LA 1093 (Alpheus R. Marshall, arbitrator 1970); *Cedar Rapids Engineering Co.*, 58 LA 374 (Albert Epstein, arbitrator 1972); *Fred Rueping Leather Co.*, 57 LA 58 (Gerald G. Somers, arbitrator 1971); *Gould Inc. (Engine Parts Division)* 56 LA 712 (Marvin L. Schurke, arbitrator 1971); *Chromalloy American Corp. & IUE*, 54 LA 965 (Edwin A. Elliot, arbitrator 1970); *Gibson Refrigerator*, 50 LA 1052 (M. David Keefe, arbitrator 1968). For a discussion of the issue from a personnel relations point of view, see Philip Harris, *Arbitrators and the Seniority Rights of Foreman*, Management of Personnel Quarterly, Fall 1966, p. 36.

The proper scope of review of arbitration awards was established in *Steelworkers* v. *Enterprise Corp.*, 363 U.S. 593, 596 (1960) wherein this Court stated:

> "The refusal of courts to review the merits of an arbitration award is the proper approach to arbitration under collective bargaining agreements."

The district court, although paying lip service to the *Steelworkers* trilogy (p. A-5) departed from this standard and in effect reviewed the merits of the arbitrator's award (pp. A-6 to A-8). The district court deemed the arbitrator's decision erroneous and by legerdemain transformed the alleged arbitral error into an arbitral excess of authority. This is an indefensible inroad on contractual finality. For a scholarly analysis of the difference between arbitral error and arbitral authority see Bernard Dunau, *Scope of Judicial Review of Labor Arbitration Awards,* N.Y.U. Conf. Lab. 24:175, 210-215 (1971). The judgment of the court reversing the district court was correct, judged by either the standards of *res judicata* or by the standards of review of arbitration awards adopted by this Court in the *Steelworkers* trilogy.

4. The decision below awarding limited attorney's fees is correct and presents no issue requiring review by this Court.

In view of the Court's ruling last term in *Hall* v. *Cole,* 93 S.Ct. 1943 (May 21, 1973) no important issue of law is raised by the petitioner's challenge to the court of appeals' limited award of attorney's fees because of the Company's intransigence in refusing to obey the arbitration award for the same reason as had already been rejected by the courts in enforcing arbitration (p. A-2).

In *Hall* this Court reiterated the principle that "federal courts in the exercise of their equitable powers may award attorney's fees when the interests of justice so require." This Court noted that (93 S.Ct., at p. 1946):

> "Indeed, the power to award such fees 'is part of the original authority of the chancellor to do equity in a particular situation,' *Sprague* v.

> *Ticonic National Bank,* 307 U.S. 161, 166 (1939), and federal courts do not hesitate to exercise this inherent equitable power whenever 'overriding considerations indicate the need for such a recovery.' *Mills* v. *Electric Auto-Lite Co.,* 396 U.S. 375, 391-392 (1970); see *Fleischmann Distilling Corp.* v. *Maier Brewing Co.,* 386 U.S. 714, 718 (1967)."

In awarding attorney's fees in *Hall,* this Court reviewed the established exceptions to the American rule that disfavors the allowance of attorney's fees and categorized the situations where federal courts have properly awarded such fees.

The category applicable here is described by this Court as composed of the litigant who has acted "in bad faith, vexatiously, wantonly, or for oppressive reasons" (93 S.Ct., at 1946). The court below having written an elaborate opinion in enforcing arbitration, detailing the various provisions in the collective bargaining agreement which could properly be construed to sustain Burke's right to reinstatement, found it unreasonable for the Company to require the Union to resort to court to enforce the award when the Company had no defense except the same arguments about contract language which the court had already rejected. The court deemed it only fair that the Company should pay the legal fees which resulted from the Company's completely unreasonable refusal to accept the first opinion of the court of appeals as settling that the language of the agreement could properly be read as authorizing the reinstatement of Burke.

This decision is in accord with recent decisions of other courts of appeals that employers who unreasonably force a union to resort to litigation under Section 301 of the Labor Management Relations Act to enforce

an arbitration award should properly be required to pay the union's attorneys fees. *Local No. 149, I.U.A.* v. *American Brake Shoe Co.*, 298 F.2d 212 (4th Cir. 1962); *Int'l Union District 50* v. *Bowman Transportation Inc.*, 421 F.2d 934, 935 (5th Cir. 1970); *Steelworkers* v. *Butler Mfg. Co.*, 439 F.2d 1110, 1112 (8th Cir. 1971).

CONCLUSION

For the foregoing reasons it is urged that the petition for a writ of certiorari should be denied.

Respectfully submitted,

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October 19, 1973

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CONCLUSION

For the foregoing reasons it is urged that the petition for a writ of certiorari should be denied.

Respectfully submitted,

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October 19, 1973

APPENDIX

APPENDIX

Opinion

No. 71-1198.

UNITED STATES COURT OF APPEALS, FIRST CIRCUIT.

Nov. 8, 1971.

PEERLESS PRESSED METAL CORPORATION, Plaintiff, *Appellant*,

v.

INTERNATIONAL UNION OF ELECTRICAL, RADIO AND MACHINE WORKERS, AFL-CIO, ET AL., Defendants, *Appellees*, 451 F.2d 19

Action for declaratory judgment seeking to enjoin arbitration of labor grievance. The United States District Court for the District of Massachusetts, W. Arthur Garrity, Jr., J., denied relief, and employer appealed. The Court of Appeals held that arbitration of question whether laid off supervisor, with 13 years of seniority as an employer prior to promotion, was entitled to reinstatement into bargaining unit as a rank and file employee was not plainly barred by bargaining agreement's inclusion of "employees" and exclusion of "supervisors," where, under a possible interpretation of the agreement, supervisors retained seniority accrued before promotions and, therefore, remained employees for purpose of exercising seniority rights, and right of reinstatement, like that of other employees, was determined solely by seniority.

Affirmed.

Before ALDRICH, Chief Judge, McENTEE and COFFIN, Circuit Judges.

PER CURIAM:

This is an action for a declaratory judgment seeking to enjoin arbitration of a labor grievance. The district court denied relief, but by agreement of the parties arbitration

was postponed until the actions should be disposed of. Appellant employer and appellee union [1] for many years have had a collective bargaining agreement calling for arbitration of "any controversy between the parties or between the Company and employees covered by this Agreement as to any matter involving the interpretation or application of any of the provisions of this Agreement" which has not been resolved through the grievance machinery. In 1965 one Burke, an employee of thirteen years seniority, was promoted to supervisor. Five years later he was laid off, and sought reinstatement into the bargaining unit as a rank and file employee. The employer refused and the union, after unsuccessfully invoking the grievance procedure, sought arbitration. The company brought this action to enjoin arbitration, claiming that the dispute is not arbitrable because Burke, as a laid-off supervisor, is not a person for whom the union is entitled to grieve.

It is common ground that although a collective bargaining agreement is a contract, it is to be more liberally construed than an agreement between private individuals. A court should not refuse to order arbitration "unless it may be said with positive assurance that the arbitration clause is not susceptible of an interpretation that covers the asserted dispute." United Steelworkers of America v. Warrier & Gulf Navigation Co., 363 U.S. 574, 582-583, 80 S.Ct. 1347, 1353, 4 L.Ed.2d 1409 (1960). This does not grant to the courts a license to inquire into the merits on the theory that they are enforcing a clause limiting arbitration to disputes requiring an interpretation of the agreement. A dispute may not be kept from the arbitrator on this ground so long as it is "possible", even if as a court we might not think it "reasonable", for an arbitrator to decide in favor of the party demanding arbitration without thereby, in

[1] Local 209, International Union of Electrical, Radio and Machine Workers, AFL-CIO.

effect, amending the plain language of the agreement. See John Wiley & Sons v. Livingston, 376 U.S. 543, 555, 84 S.Ct. 909, 11 L.Ed.2d 898 (1964); Camden Industries Co. v. Carpenters Local Union No. 1688, 353 F.2d 178, 180 (1st Cir. 1965).

The company relies on Article II—Coverage, which provides that "This Agreement applies only to all • • • employees • • • but excluding • • • supervisors as defined in the Act." If Article II were susceptible only of a very precise and narrow definition of "employee", the mere fact that other clauses could be read consistently with a broader definition would not suffice for arbitrability. We read certain clauses of the agreement, however, as arguably pointing positively to a different and wider definition. Under these circumstances, we deem it proper for an arbitrator to resolve the dispute. In particular, the notion that seniority is inextricably intertwined with the right to reinstatement provides, in our view, a basis for an interpretation favorable to Burke of the word "employee" in the coverage clause. The argument would be that under the agreement supervisors retain seniority accrued before their promotions and that, therefore, they remain employees for the purpose of exercising seniority rights and their right of reinstatement, like that of other employees, is determined solely by their seniority. On this theory, arbitration of the grievance is not plainly barred by the Article II inclusion of "employees" and exclusion of "supervisors".

Support for the proposition that supervisors retain accrued seniority rights could be drawn from two provisions of the agreement. In setting forth the conditions under which employees lose seniority rights, Article XVIII does not indicate that they are lost upon promotion to supervisory status. Additionally, Article XXII(f) explicitly provides that an employee promoted to be the "seventh foreman" (not Burke) retains his seniority rights as of the date of his promotion. While one might argue that this states an

exception to the general rule rather than an illustration of it, the former interpretation is by no means compelled by the language. The company concedes that arbitrators ordinarily grant accrued seniority rights to foremen who are promoted from the bargaining unit and then returned to it.

While the construction of the agreement which would confer employee status for the purposes of Article II on one who seeks to exercise seniority rights is weak, we cannot conclude that it is impossible. We note that, under settled law, a laid-off employee is still an employee.[2] Burke is arguably in a status akin to, if somewhat different from, that of a laid-off employee. He is willing to work though not now working and arguably possesses certain rights which have accrued to him, *qua* employee, under the collective bargaining agreement. This position has been taken in several arbitrators' decisions which, while they deal with different collective bargaining agreements and do not in any event bind us, suggest that the mode of analysis is not inconceivable to those involved in labor-management relations.[3]

To say that Burke may be an employee for the purpose of reinstatement is not to conclude that he is entitled to reinstatement. To determine the merits of Burke's claim, the arbitrator may look to the "law of the shop" and to the negotiations which led to the present agreement as well as to the other provisions of the agreement. These might include the management rights clause (Article XIV), the union membership clause which requires that all employees "including former supervisory personnel who have been demoted by the Company into the bargaining unit" must join the union (Article IV(c)), and the provision that the

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[2] See American Cyanamid Co., 19 N.L.R.B. 1026, 1033 (1940); Unit Cost Corporation, 7 N.L.R.B. 129, 133 (1938).

[3] Reynolds Metals Co., 55 L.A. 1011 (1970); Babcock and Wilcox Co., 48 L.A. 1234 (1967); F.H. Noble & Co., 28 L.A. 641 (1957).

seventh foreman will, under certain circumstances, "revert to his previous status".

The language of these provisions would seem to permit the "possible" inference that demotion or reversion is automatic when a former production worker is laid off or discharged as a supervisor. On the other hand, the arbitrator could surely conclude that management has complete discretion over Burke's rehiring. What is crucial here is simply that the agreement could be read as entitling him to reinstatement. So reading the agreement, under the rigorous standard of judicial restraint applicable to this field, we affirm the district court's order to arbitrate.

Julius Kirle, Boston, Mass., for appellant.

Michael A. Feinberg, Bost, Mass., for appellees.